

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. L 2006110562

MARGARET M.

Petitioner,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Carolyn D. Magnuson, Administrative Law Judge of the Office of Administrative Hearings, on December 14, 2006, in Torrance, California.

Ilva M., Petitioner's mother, represented Petitioner.

Steven Roberts, Hearing Coordinator for Harbor Regional Center (HRC or Service Agency) represented HRC.

Evidence having been received, the matter was submitted at the close of the hearing.

ISSUES

The issues to be decided are:

- a. Whether the Regional Center should pay for Petitioner to attend Phases, a center based infant development program, and if so,
- b. Whether Petitioner's family should be reimbursed the cost of Petitioner's attendance at Phases from July 2006 to the present, and

- c. How the Service Agency's asserted inability to contract with Phases to provide services for Petitioner would impact the Service Agency's ability to pay for Petitioner's participation in the Phases program.

FINDINGS OF FACT

1. Petitioner is a 29 month old girl who was found to be eligible to participate in the Early Start Program beginning in June 2005 because she was determined to have significant motor skill developmental delays.
2. Petitioner was born at 31 weeks gestation and was not released to go home for six weeks after her birth. Thereafter, she continued to have health challenges related to tetralogy of Fallot, a condition with which she was born, and underwent corrective heart surgeries in November 2004 and August 2005. As a result of these procedures, Petitioner was subjected to extensive and traumatic medical procedures both in and out of the hospital. During her first 15 months of life, Petitioner spent 10 weeks in the hospital.
3. After the second surgery, Petitioner was able to enjoy a more normal childhood, focused more on developmental activities and less on medical interventions. However, Petitioner's mother believes that Petitioner's overall development has been significantly delayed as a result of her premature birth and her having undergone extensive medical procedures.
4. Petitioner's mother is employed outside the home. Prior to beginning her teaching assignment on August 1, 2006, she enrolled Petitioner at Phases, which is described as being an "early learning comprehensive." When Phases was initially vendored by HRC, it had on staff both a speech therapist and a physical therapist. However, those positions no longer were staffed in July 2006 when Petitioner began attending Phases.
5. According to Petitioner's mother, the Phases program still has a very strong physical therapy element in its program which is beneficial to Petitioner. Moreover, the Phases program is designed to promote physical and mental development, and Petitioner's mother feels that Petitioner's participation will allow her to overcome any delays in her development resulting from her premature birth and medical issues.
6. In July 2006, an Individualized Family Service Plan (IFSP) was developed for Petitioner and was signed by Petitioner's mother. The IFSP noted that an evaluation of Petitioner, using the Revised Gessell Developmental Assessment, had been done by her physical therapist in June 2006, just prior to Petitioner's second birthday, which found that Petitioner's cognitive level was 24 months, that her gross and fine motor development ranged between 15 and 18 months, while her communication and social skills ranged from 18 to 21 months.

7. The IFSP called for the Service Agency to pay for Petitioner to continue to receive physical therapy once a week for an hour and occupational therapy once a week for an hour, both services to be provided at a clinic based program at Torrance Memorial Medical Center.

8. The IFSP also noted that Petitioner's mother planned to enroll Petitioner in a typical preschool and that no HRC supports were expected for that endeavor. However, in July 2006, Petitioner was enrolled in Phases rather than in a typical preschool.¹ Thereafter, Petitioner's mother asked the Service Agency to pay for Petitioner's participation in the Phases program. In support of her request, Petitioner's mother cited the benefits to Petitioner of being exposed to other children, of having an opportunity to prepare in a safe environment for her eventual enrollment in a typical preschool environment, and of Petitioner's participating in the more intensive intervention program provided at Phases.

9. In August 2006, when Petitioner was approximately 26 months old, another developmental evaluation was done by an occupational therapist who used the Bayley Scales of Infant Development III to assess Petitioner and found that Petitioner's cognitive skills were at the 33 month level, that her receptive communication skills were at the 28 month level, that her expressive communication skills were at the 23 month level, and that her fine motor skills were at the 23 month level. Thus, Petitioner demonstrated no significant developmental delays in any of these domains. It was only in the area of gross motor skills that Petitioner showed a significant 12 month delay in her skill development. In addition, Petitioner's self-help skills and social skills were determined to be appropriate to her age.

10. Based on the results of the August 2006 developmental evaluation, HRC's staff determined that Petitioner's only area of developmental delay involved her motor skills and that HRC was already providing appropriate services to address that problem. In the absence of significant delays in any other developmental domain, Petitioner's participation in the Phases program was found to constitute enrichment not therapy. Thus, HRC declined to pay for Petitioner to attend/participate in the Phases program.

LEGAL CONCLUSIONS

1. The California Early Intervention Services Act is designed "to provide a statewide system of coordinated, comprehensive, family-centered, multidisciplinary, interagency programs, responsible for providing appropriate early intervention services and support to eligible infants and toddlers and their families." (Gov. Code § 95002.)

¹ It appears that Phases also has a preschool program for typically developing children. The extent of the integration between the early intervention program and the typical preschool program was unclear.

2. Under federal law, the term “infants and toddlers with disabilities” means individuals younger than three years old who need early intervention services because they are experiencing developmental delays in the areas of cognitive development, physical development, language and speech development, social or emotional development, or self-help skills. In addition, those infants and toddlers who have a diagnosed mental or physical condition that typically results in a delay, or who are at risk of substantial delay, are included in the definition (at the state’s discretion). The criteria for these definitions are to be determined by each state. (20 U.S.C. § 1432, subd. (5).)

3. Under California law an eligible child is one who is younger than three years old; who needs early intervention services, as documented through assessment and evaluation; and who meets one of the following criteria:

- a. Demonstrates a developmental delay² in one or more of the following five areas: cognitive development; physical and motor development, including vision and hearing; communication development; social or emotional development; or adaptive development.
- b. Has one or more established risk conditions either of known etiology or with established harmful developmental consequences.³
- c. Is at high risk of having substantial developmental disability due to a combination of biomedical risk factors, the presence of which is diagnosed by qualified clinicians who are recognized by, or part of, a multidisciplinary team, including the parents. (Gov. Code § 95014, subd. (a) (1) – (3).)

4. The purpose of Early Start is to prevent or ameliorate developmental delays by providing services which deal with existing or objectively potential developmental deficits. Thus, when a child is assessed and found to be eligible for Early Start services, those services must address the child’s specifically identified delays. In other words, Early Start eligibility is limited in scope to the qualifying condition or conditions. Therefore, unless Petitioner has qualifying delays in a developmental domain other than motor skills, she is not eligible to receive Early Start services for any other condition.

5. It may be true, as Petitioner’s mother believes, that, had Petitioner’s initial life experiences been less traumatic, she would have been further along in her

² Developmentally delayed infants and toddlers are those who are determined to have a significant difference between the expected level of development for their age and their current level of functioning.

³ The condition shall be certified as having a high probability of leading to developmental delay if the delay is not evident at the time of diagnosis.

development than she presently is. Nonetheless, Petitioner's present level of development is within the normal range for a child of her age in all areas but motor skills.

6. Therefore, since Petitioner has not demonstrated any actual or potential developmental delays, other than in the area of motor skills, under Early Start provisions, it would not be appropriate for the Service Agency to provide services to her in any domain but motor skills.⁴

7. In fact, as the Service Agency stated, Petitioner's participation in the Phases program constitutes only enrichment for her, not treatment. Therefore, the Service Agency was correct when it denied Petitioner's request that HRC pay for her to attend the Phases program.

8. Thus, it follows that reimbursement for Petitioner's past costs for the Phases program is also not appropriate.

9. Finally, based on the prior Legal Conclusions, the issue of HRC's contracting with Phases is moot vis-à-vis this case.

ORDER

The Service Agency's denial of Petitioner's request for HRC to pay for Petitioner to attend/participate in the Phases program is sustained.

Dated: January 26, 2007

CAROLYN D. MAGNUSON
Administrative Law Judge
Office of Administrative Hearings

⁴ The fact that the Phases program may be unusually hospitable to a child with motor skills challenges is not sufficient to qualify Petitioner's participation in Phases as therapy for her.